91-1398

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GIRLING HEALTH SYSTEMS, INC.,
Petitioner,
vs.
THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Claims Court apply the proper Fifth Amendment due process standard before dismissing Petitioner's complaint for lack of subject matter jurisdiction?

2. Did the Court of Appeals properly review the Rule 12(b)(1) dismissal by the Claims Court?

3. What is the proper judicial procedure for subject matter jurisdiction determinations in implied-in-fact contract actions?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption.

RULE 29.1 STATEMENT

Girling Health Systems, Inc. has no parent company nor subsidiaries.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

GIRLING HEALTH SYSTEMS, INC.,
Petitioner,
vs.
THE UNITED STATES
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, affirming the judgment of the Claims Court, is attached hereto as Appendix A. The opinion of the Claims Court granting Respondent's motion to dismiss for lack of jurisdiction is attached hereto as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was filed on November 22, 1991.

Jurisdiction in this Court is invoked as a Federal question under the Due Process Clause of the U.S. Const. amend. V, arising out of an implied-in-fact contract action in the Claims Court under 28 U.S.C. §1491.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the U.S. Const. amend. V, the pertinent text of the Tucker Act, 28 U.S.C. §1491, and Claims Court Rule 12(b)(1), Rule 12(b)(6) and Rule 56(c) are set forth in Appendix C.

STATEMENT OF THE CASE

On June 23, 1989, Petitioner, Girling Health Systems, Inc. ("Girling"), filed suit in the Claims Court for breach of an implied-in-fact contract. Girling alleged that the instructions to Internal Revenue Service (IRS) Form 2553, regarding the manner of election to become a Subchapter-S small business corporation, contained an offer that the IRS would respond to such an election in a timely manner; this offer was accepted by Girling's filing of Form 2553 to elect Subchapter-S status for its fiscal year ending July 31, 1987.

Girling alleged that the IRS breached its implied-in-fact contract since it did not act on Girling's Form 2553 (which was filed on October 15, 1986), until December 15, 1987. Girling alleged that the IRS's breach of its implied-in-fact contract prevented Girling from timely filing an application for change of accounting method. As a result, Girling suffered damages in the amount of interest and penalties charged by the IRS.

When Petitioner responded to Respondent's interrogatories on February 27, 1990, Petitioner indicated its expectation to be able to present witnesses to prove its implied-in-fact contract claim. On June 14, 1990, Petitioner responded to Respondent's Rule 12 (b)(1) motion and indicated that it was inappropriate to dispose of the

case on jurisdictional grounds without a factual inquiry (including witness testimony).

On October 5, 1990, the hearing on the Rule 12 (b)(1) Motion was held without notice of the Claims Court's intention to make a factual (as compared to a facial) determination. Again, on page 7 of the transcript, Petitioner requested the opportunity to present post-hearing evidence as to whether a contract existed.

On November 20, 1990, the Claims Court dismissed Petitioner's complaint for lack of subject matter jurisdiction, stating:

> "Suits alleging implied-in-fact contracts are generally fact intensive, and determining when and whether there was the necessary meeting of the minds frequently requires resolution of a factual dispute. However, this case presents an exception to that general rule since this dispute would not benefit from further factual ventilation. . . ." (Appendix p. B-7.)

On January 17, 1991, Petitioner appealed to the Court of Appeals for the Federal Circuit. On April 19, 1991, Petitioner filed its appeal brief, requesting the opportunity to produce witnesses and evidence of the existence of the implied-in-fact contract in the Claims Court. On September 11, 1991, Petitioner presented oral argument before the Court of Appeals.

On November 22, 1991, the Court of Appeals affirmed the Claims Court's dismissal of the complaint without making reference to Petitioner's primary position in its appeal brief, namely: *the Claims Court should have approved Petitioner's request for the opportunity*

to present post-hearing evidence of the existence of the implied-in-fact contract prior to a factual ruling.

At every possible juncture, Petitioner requested the opportunity to present evidence and prove its fact-intensive implied-in-fact contract. It's request was turned down in the Claims Court and ignored by the Court of Appeals, thus depriving Petitioner of its right to due process and giving rise to this petition.

REASONS FOR GRANTING THE WRIT

I

The Inconsistent Availability Of Constitutionally Protected Due Process In A Rule 12(b)(1) Subject Matter Jurisdiction Proceeding Presents An Important Constitutional Question That Has Not Been, But Should Be, Settled By This Court.

In a fact intensive implied-in-fact contract action (such as Girling), there is the temptation for the Claims Court to reach a decision on the merits by masking it as a Rule 12(b)(1) dismissal, thereby denying a plaintiff the right to present evidence on its behalf.

In a Rule 12(b)(1) proceeding, the issue should not be whether the Plaintiff will ultimately prevail, but, rather, whether it is entitled to present evidence in an effort to prevail. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), Chief Justice Burger observes:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by

> affidavit or admissions, its task is necessarily a limited one. *The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims*. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Id.* at 236. (Emphasis added.)

In spite of the seemingly clear direction contained in *Scheuer v. Rhodes, supra*, there is some confusion regarding the proper standard to be applied in Rule 12(b)(1) determinations. For example, in *In Re Swine Flu Immunization Prod. Liability Lit.*, 880 F.2d 1439 (D.C. Cir. 1989), the Court states:

> "There is a question as to the appropriate standard for the grant of a Rule 12(b)(1) motion. . . ." *Id.* at 1442.

Also, in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981), the Court states:

> "The district court consequently had the power to dismiss for lack of subject matter jurisdiction on *any one of three* separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced

> in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* at 413. (Emphasis added.)

The scope of Fifth Amendment due process protection has been determined by balancing the interests favoring summary determination against the interests of the litigant in additional procedural protection. In *Matthews v. Eldridge*, 424 U.S. 319 (1976) Justice Powell employed a three prong test: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirements would entail.

In view of the apparent uncertainty of lower courts regarding the due process standard to be followed in subject matter jurisdiction proceedings, it is important that the air be cleared.

Direction from this Court would settle the current inconsistency and uncertainty and provide both litigants and the judiciary with clear procedures calculated to protect the constitution while at the same time supporting the efficient administration of the court system.

II

The Court Of Appeals, By Affirming The Claims Court's Rule 12(b)(1) Dismissal, Without Extra-pleading Evidence In The Record, Has Encouraged A Departure From Accepted Norms In Federal Court Subject Matter Jurisdiction Proceedings.

A subject matter jurisdiction dismissal under Rule 12(b)(1) is not on the merits (*Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2nd Cir. 1976)); accordingly, a summary judgment proceeding under Rule 56 is not available. (*Williamson v. Tucker, supra,* 645 F.2d at 412.)

In order to resolve factual disputes, it is well established that the lower court should review evidence outside the pleadings, including affidavits and testimony. In *Local 336, American Fed. Of Musicians, AFL-CIO v. Bonatz*, 475 F.2d 433 (3rd Cir. 1973), the Third Circuit reversed the district court's dismissal and explained:

> "[W]e recognize that the district courts have more latitude as to modes of proof in the disposition of issues of jurisdictional fact. *E.g., Tanzymore v Bethlehem Steel Corp.*, 457 F.2d 1320 (3rd Cir. 1972); *Nelson v. Keefer*, 451 F.2d 289 (3rd Cir. 1971). But we have never departed from the rule that even on such an issue *the record must clearly establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by*

> *affidavit or by deposition, or in an evidentiary hearing,* in support of his jurisdictional contention. *E.g., Groh v. Brooks*, 421 F.2d 589, 594 (3rd Cir. 1970); *Shahmoon Industries, Inc. v. Imperato*, 338 F.2d 449 (3rd Cir. 1964). The existence of an agreement between a labor organization and an employer is, for §301 purposes, a jurisdictional fact. For the determination of that fact, no doubt, those more liberal modes of proof apply which the Supreme Court has approved for jurisdictional determination. Whether the court proceeds by considering affidavits or depositions, or by an evidentiary hearing, however, *something must appear of record* to contradict the pleaded and uncontroverted jurisdictional allegation that there was a §301 contract and to support the district court's determination." *Id.* at 437-438. (Emphasis added.)

The dismissal of a complaint without permitting an opportunity to demonstrate that jurisdiction exists has been treated as reversible error. In *Eaton v. Dorchester Development*, Inc., 692 F.2d 727 (11th Cir. 1982), the Eleventh Circuit held:

> "We hold that the district court's dismissal for lack of subject matter jurisdiction was premature. *Plaintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction.* As we said in *Blanco* [*Blanco v.*

> *Carigulf Lines*, 632 F.2d 656 (5th Cir. 1980)], 'the rules entitle a plaintiff to elicit material through discovery before a claim may be dismissed for lack of jurisdiction.' 632 F.2d at 658." *Id.* at 731. (Emphasis added.)

In Girling, existence of the implied-in-fact contract is both the basis of subject matter jurisdiction under 28 U.S.C. §1491 and the ultimate objective of trial on the merits. In such a situation, courts have assumed that jurisdiction exists and have dealt directly with the merits of the claim. (See Argument III, *infra*.)

In *Adams v. Bain*, 697 F.2d 1213 (4th Cir. 1982), the Fourth Circuit concludes:

> "[W]e conclude that not only were there not sufficient facts developed at the 12(b)(1) hearing to resolve the jurisdictional issue, but that *the facts are so intertwined with the facts upon which the ultimate issues on the merits must be resolved, that 12(b)(1) is an inappropriate basis upon which to ground the dismissal.*
>
> "We express no opinion on the merits of the appellants' case. It may well be that the actions allegedly taken by York County and the VFD were constitutionally permissible. That is an ultimate conclusion that can by reached only after a full trial. . . ." *Id.* at 1220. (Emphasis added.)

In the particular context of the Rule 12(b)(1) dismissal of the Girling implied-in-fact contract action, the Claims Court had two choices: (1) to make a facial

determination, in which case the jurisdictional inquiry is limited to the face of the pleading itself (*Williamson v. Tucker, supra*, 645 F.2d at 412-413); or (2) a factual determination, in which case, the court should have allowed evidence in order to determine whether facts are in dispute. In *Williamson v. Tucker, supra*, 645 F.2d at 413, the Fifth Circuit states:

> "[T]his means that the district court is not limited to an inquiry into undisputed facts. It may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction. . . ."

Upon appeal, the court indicated that Girling must establish the elements of the implied-in-fact contract:

> "[T]hus, to establish jurisdiction based on an implied contract, an appellant must establish the elements of a contract, including consideration, mutuality of intent, and definiteness of terms. . . ." (Appendix p. A-4.)

These contract elements can only be established through the introduction of evidence.

The opinion of the Court of Appeals concludes:

> "We are convinced that Girling did not show either the mutuality of intent to contract or the definiteness of terms that would be necessary to support an implied contract. . . ." (Appendix p. A-5.)

The Court of Appeals placed the burden on Girling to prove its contract claim, then concluded that Girling had not borne that burden, but did not comment on Girling's primary position: *that the Claims Court did not give Girling the opportunity to present evidence to prove its contract claim.*

Apparently, the Court of Appeals erroneously believed that Girling had introduced evidence to prove the necessary elements of an implied contract.

The decision of the Court of Appeals, indirectly at least, supports the Claims Court's apparent decision not to authorize the submission of post-hearing evidence. The Court of Appeals did not comment on the absence of evidence in the record, nor respond to Girling's evidentiary request presented in its appeal brief.

If the Claims Court had approved Girling's request for the opportunity to submit post-hearing evidence and then had ruled that it lacked jurisdiction, the decision of the Court of Appeals would have been correct and Girling would not be submitting this petition.

As is stated in *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985) at page 1115:

> "[T]he Claims Court Rules do, however, embody the same *notions of fundamental fairness*, buttressed by the *constitutional requirement of due process*, which mandate *that a party have some opportunity, reasonable in the circumstances, to present a case* before judgment is entered against it." (Emphasis added.)

Although *Thoen* dealt with Rule 12(b)(6) and, accordingly, with Rule 56, its message is equally applicable to the Girling case.

It is the failure of the Claims Court, to permit Girling the opportunity to present post-hearing evidence, that departs from accepted norms of judicial conduct. When this abridgement is encouraged by the Court of Appeals affirmation (in the absence of extra-pleading evidence in the record), it cries for the exercise of this Court's supervisorial powers.

III

Implied-in-fact Contract Actions Are Unique In That The Merits Are Inextricably Interwoven With Jurisdiction. In Such A Case, Judgment On The Merits, Not Subject Matter Jurisdiction Under Rule 12(b)(1), Is The Appropriate Judicial Procedure.

Jurisdictional facts, in an implied-in-fact contract action, are intertwined with the merits of the contract claim. In Girling, the existence of a contract under 28 U.S.C. §1491 is, by definition, both the basis of jurisdiction and the focus of litigation on the merits.

If the court determines that it lacks jurisdiction, it will also have decided the case on the merits.

Although, generally, courts are expected to satisfy themselves as to their jurisdiction before proceeding to the merits, *this is not the case* when jurisdictional facts are synonymous with ultimate facts on the merits. *See Land v. Dollar*, 330 U.S. 731, 739 (1947) for the general principle that the trial court has jurisdiction to determine its own jurisdiction by proceeding to a decision on the merits.

In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), this Court noted:

> "there is * * * an identity between the 'jurisdictional' issues and certain issues on the merits, and hence, under *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947), no objection to reserving the jurisdictional issues until a hearing on the merits. By the same token, however, there is no objection to use, in appropriate cases, summary judgment procedure to determine whether there is a genuine issue of material fact as to the interstate commerce clause." *Id.* 419 U.S. at 203 n.19.

In the Girling type situation, the courts have held that the preferable practice is to assume that jurisdiction exists and determine the merits pursuant to Rule 12(b)(6) and Rule 56. In the alternative, the court may proceed to trial.

In *Timberlane Lumber Co. v. Bank of America N.T.S.A*, 549 F.2d 597 (9th Cir. 1976), the Ninth Circuit states on page 602:

> "[A]lthough the Supreme Court in *Hospital Building* did not elaborate, it seems settled that, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous. . . ."

(*See Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738 (1976).)

In *Thornhill Pub. v. General Telephone & Electronics*, 594 F.2d 730 (9th Cir. 1979), the court states on page 735:

> "[W]e acknowledged that where the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits, a party is entitled to have the jurisdictional issue submitted to the jury, rather than having the court resolve factual issues. *Berardinelli, supra*, 587 F.2d at 39."

See Mortenson v. First Federal Sav. and Loan Ass'n, 549 F.2d 884, 892-897 (3rd Cir. 1977) for analysis of various circuit court positions on propriety of subject matter jurisdiction dismissals where a decision on jurisdiction is intertwined with a decision on the merits.

In *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983), the court states:

> "This case was before the district court on a motion to dismiss for want of subject matter jurisdiction. Because the jurisdictional issue is dependent upon the resolution of factual issues going to the merits, it was incumbent upon the district court to apply summary judgment standards in deciding whether to grant or deny the government's motion. . . ." *Id.* at 1079.

In *Sun Valley Gasoline, Inc. v Ernst Enterprises, Inc.*, 711 F.2d 138 (9th Cir. 1983), the basis of jurisdiction was 15 U.S.C. §2805(a). This franchise relationship was also the basis for plaintiff's claim for relief. The court held that, since a federal statute was the basis of both jurisdiction and the merits, the applicability of the statute should not be decided under Rule 12(b)(1). Instead, it should be decided by a Rule 56 proceeding or at trial. In its opinion, the court states:

> "[N]ormally, the question of jurisdiction and the merits of an action will be considered intertwined where, as here, 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.' *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976). See *Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir. 1979), *cert. denied*, 444 U.S. 867, 100 S. Ct 139, 62 L. Ed.2d 90 (1979). . . ." *Id.* at 139-140.
>
> "Since the district court's decision was not made under the standards applicable to motions for summary judgment under Fed. R.Civ.P. 56, it is unclear whether the court was deciding factual matters in genuine dispute. A court may, in certain instances, decide genuinely disputed factual issues relating to jurisdiction prior to trial. *Land v. Dollar*, 330 U.S. 731, 735 n. 4. 67 S.Ct. 1009, 1011 n.4, 91 L.Ed. 1209 (1947); *Augustine v. United States*, 704 F.2d 1074, 1077

> (9th Cir. 1983); *Thornhill Publishing Co. v General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). However, because jurisdictional fact-finding by the court deprives litigants of the protections otherwise afforded by Rule 56, we have defined certain limits upon this power of the court." *Id.* at 139.
>
> "Jurisdictional findings of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of an action. *Augustine*, 704 F.2d at 1077. See *Thornhill*, 594 F.2d at 733-35; *Berardinelli v. Castle & Cooke, Inc.*, 587 F.2d 37, 39 (9th Cir. 1978). . . ." *Id.* 711 F.2d at 139.

In *Adams v. Bain*, 697 F.2d 1213 (4th Cir. 1982), the court held that when jurisdiction and the merits both depended on the same facts, the issue should be resolved by a proceeding on the merits, not by a Rule 12(b)(1) motion. On page 1219, the Fourth Circuit states:

> "[U]nlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction. This does not usually present a serious problem except in those cases where the jurisdictional facts are intertwined

> with the facts central to the merits of the dispute. It is the better view that in such cases the entire factual dispute is appropriately resolved only by a proceeding on the merits. *See Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979); *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F.2d 359 (5th Cir. 1967), *cert. denied*, 389 U.S. 896, 88 S.Ct. 216, 19 L.Ed.2d 214 (1967); *Mortensen v. First Federal Sav. and Loan Ass'n.*, 549 F.2d 884 (3rd Cir. 1977); *see also Hospital Building Co. v. Trustees of Rex Hospital*, 511 F.2d 678, 680-81 (4th Cir. 1975), *rev'd on other grounds*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *see generally 2A Moore's Federal Practice* 12.16 (1982 & Supp.)"

In *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982), the plaintiff relied on 15 U.S.C. §§ 1701-1720, which was also the pivotal point on the merits. The court ruled that, when jurisdiction is inextricably intertwined with the merits of the plaintiff's case, the strict standard enunciated in *Bell v. Hood*, 327 U.S. 678 (1945) and in *Williamson v. Tucker, supra*, 645 F.2d 404, suggests that the case should not be dismissed on subject matter jurisdictional grounds. On page 733, the Eleventh Circuit states:

> "Where the jurisdictional issues are intertwined with the substantive merits, 'the jurisdictional issues should be referred to the merits, for it

> is impossible to decide one without the other' *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002, 1011 (5th Cir. 1979). . . ."

In *Sierra Club v. Shell Oil Company*, 817 F.2d 1169 (5th Cir. 1987), the Fifth Circuit points out at page 1172:

> "[J]udicial economy further counsels resolution on the merits in these instances so that the court can avoid duplicate trials of facts essential to both jurisdiction and the merits of the claim. *Id.* at 415-16." *citing Williamson v. Tucker, supra*, 645 F.2d 404 at 415-16.

All of the above cases stand for the same proposition:

It was improper for the Claims Court to dismiss the Girling complaint pursuant to a Rule 12(b)(1) determination, since the existence of an implied-in-fact contract was both the basis of jurisdiction under 28 U.S.C. §1491 and the ultimate determinant of the merits in the litigation.

CONCLUSION

A review of the issues in the Girling case will enable this Court to resolve the current inconsistency and uncertainty regarding the proper due process standard to be applied in Rule 12(b)(1) subject matter jurisdiction proceedings. Further, this Court's review will settle the issue of the Court of Appeal's role in reviewing Rule 12(b)(1) dismissals by trial courts. Finally, a review will provide a uniform standard in reaching subject matter jurisdiction determinations where the jurisdictional facts are also the ultimate facts on the merits.

For the above reasons, and on the basis of the facts presented and the authorities cited in this petition, petitioner respectfully requests that this petition for writ of certiorari to the Court of Appeals for the Federal Circuit be granted.

February 13, 1992.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

91-5043

GIRLING HEALTH SYSTEMS, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Michael J. Christianson, Law offices of Michael J. Christianson, Inc., of Newport Beach, California, argued for plaintiff-appellant.

Bridget M. Rowan, Attorney, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were Shirley D. Peterson, Assistant Attorney General, Gary R. Allen and William S. Estabrook, Attorneys.

Appealed from: U.S. Claims Court
Judge Yock

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

91-5043

GIRLING HEALTH SYSTEMS, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: November 22, 1991

Before ARCHER, MICHEL and PLAGER, Circuit Judges.

ARCHER, Circuit Judge.

OPINION

Girling Health Systems, Inc. (Girling) appeals the November 20, 1990 order of the United States Claims Court, No. 372-89 T, dismissing Girling's action for lack of subject matter jurisdiction. We affirm.

I

Girling filed suit in the Claims Court for breach of an implied-in-fact contract. Girling claimed that Internal Revenue Service (IRS) Form 2553, entitled "Election by

a Small Business Corporation," contained an offer that IRS would act in a timely manner and that this offer was accepted when Girling filed Form 2553 to elect Subchapter S status for its fiscal year ending July 31, 1987. *See* 26 U.S.C. § 1361 (1988). The instructions to Form 2553 contained the following pertinent language:

> E. Acceptance or Non-acceptance of Election. — IRS will notify you if your election is accepted and when it will take effect. *You should generally receive determination on your election within 60 days after you have filed Form 2553.* Do not file Form 1120S until you are notified that your election is accepted. . . .
>
> You will also be notified if your election is not accepted.
>
> Care should be exercised to ensure the election is received by Internal Revenue Service. If you are not notified of acceptance or non-acceptance of your election within *3 months* of date of filing (date mailed), *you should take follow-up action* by corresponding with the service center where the election was filed.

[Emphasis added.]

Girling alleged that the IRS breached an implied-in-fact contract when it did not act on Girling's Form 2553, which was filed on October 15, 1986, until December 15, 1987. When Girling's request for Subchapter S status was finally declined by the IRS, Girling then attempted to change its accounting method from cash basis to accrual basis. Girling's application for change of accounting was denied because it was untimely filed.

Girling contended that the government's breach of the alleged contract prevented it from timely filing an application for change of accounting and it thereby suffered damages.

The Claims Court granted the government's motion to dismiss for lack of jurisdiction. It concluded that there was no implied-in-fact contract on which to base jurisdiction, and that there was no reason to allow Girling to amend its complaint from an action based on contract to an action for a tax refund.

II

The Claims Court has jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1) (1988). The Claims Court's jurisdiction extends only to actual contracts, express or implied, and not to contracts implied at law. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 465 n.5 (1980). Thus, to establish jurisdiction based on an implied contract, an appellant must establish the elements of a contract, including consideration, mutuality of intent, and definiteness of terms *Tree Farm Dev. Corp. v. United States*, 585 F.2d 493, 500 (Ct. Cl. 1978) (quoting *Russell Corp. v. United States*, 537 F.2d 474, 482 (Ct. Cl. 1976) ("The requirements of mutuality of intent and lack of ambiguity in offer and acceptance are the same for an implied-in-fact contract as for an express contract . . . .")); *Somali Dev. Bank v. United States*, 508 F.2d 817, 822 (Ct. Cl. 1974) ("It is fundamental that to constitute an implied contract upon which one may recover under the Tucker Act, there must be some consideration moving to the United States . . . .").

Girling argues that the instructions to the IRS Form 2553 implicitly promised that the IRS would respond to

a taxpayer's election request in a reasonable time. However, the language of the instructions does not support this contention. The instructions state only that the taxpayer "should *generally* receive determination on [its] election within 60 days after [filing] Form 2553." (Emphasis added.) This language manifests no intent to be bound. The instructions also state that "[i]f you are not notified of acceptance or non-acceptance of your election within *3 months* of date of filing (date mailed), *you should take follow-up action* by corresponding with the service center where the election was filed." (Emphasis added.) By instructing the taxpayer to contact the IRS if the IRS has not acted on the requested tax status within three months, it is clear that not all Subchapter S elections are acted on within the sixty-day or even the three-month period. Thus, no contractual promise was made by the IRS to act within any particular time. A definite promise to act within a reasonable time, as Girling would have it, cannot be gleaned from this IRS form. Girling's filing of Form 2553, therefore, cannot be considered as an acceptance of a contractual offer.

We are convinced that Girling did not show either the mutuality of intent to contract or the definiteness of terms that would be necessary to support an implied contract. *See Tree Farm Dev. Corp.*, 585 F.2d at 500. Further, Girling made no allegation suggesting that the United States received the consideration necessary to form a binding contract. *See Somali Dev. Bank*, 508 F.2d at 822.

Girling relies heavily on *Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988), in support of its claim that an implied-in-fact contract exists for the purpose of the Claims Court's jurisdiction. In *Merrick*, however, the government's intent to bind itself was clear — it offered a reward for a definite amount. *Merrick*, 846

F.2d at 725. The issue of consideration was not involved because the contract arose as a result of a statutorily authorized reward offer.

Finally, the Claims Court properly declined to permit Girling to amend its complaint in order to proceed on a tax refund theory. Girling's damage claim did not relate to, or allege, any overpayment of tax. Moreover, Girling did not contend that any tax refund claim had been filed with the IRS, a jurisdictional requirement for commencing a suit for refund in the Claims Court. 26 U.S.C. § 7422 (1988).

Accordingly, the Claims Court's order dismissing Girling's suit for lack of subject matter jurisdiction is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 372-89T

{Filed: NOV 20 1990}

GIRLING HEALTH SYSTEMS, INC.	*	Tax; corporation income tax; IRS form and instruction creating implied-in-fact contract; declaratory judgment authority; jurisdiction.
v.	*	
THE UNITED STATES	*	

Michael J. Christianson, Newport Beach, California, attorney of record for plaintiff.

Thomas D. Sykes, Washington, D.C., with whom was Assistant Attorney General Shirley D. Peterson, for defendant.

OPINION

YOCK, Judge:

The plaintiff, Girling Health Systems, Inc., seeks money damages and declaratory relief based upon breach of an implied contract with the United States through the Internal Revenue Service. The case is before the Court on the defendant's motion to dismiss for lack of subject matter jurisdiction.

After oral argument and for the reasons discussed herein, the defendant's motion is granted, and the plaintiff's complaint will be dismissed.

Facts

Plaintiff, a "C" corporation, was incorporated on August 1, 1982 and has consistently filed its federal income tax returns based on the cash basis method of accounting and a July 31 fiscal year. Under 26 U.S.C. § 448 of the Tax Reform Act of 1986, "C" corporations were required to utilize the accrual method of accounting for any taxable year beginning after December 31, 1986, but this requirement did not apply to the taxable year at issue that ran from August 1, 1986 to July 31, 1987. However, if plaintiff wanted to change its method of accounting (*i.e.*, from cash basis to accrual) for this fiscal year, the deadline for requesting permission for the change was April 26, 1987, since the deadline is 270 days from the beginning of the fiscal year (August 1, 1986).

Section 448 applies to "C" corporations but not to subchapter "S" (small business) corporations. Accordingly, "S" corporations may utilize either the cash basis or the accrual method of accounting at their election. On October 15, 1986, pursuant to 26 U.S.C. § 1362 (1982), plaintiff filed Form 2553 with the Internal Revenue Service (IRS), electing subchapter "S" corporation status while retaining its July 31 fiscal year instead of adopting a December 31, taxable year.[1] Plaintiff intended to continue using the cash basis method of accounting. In order to make the "S" corporation election, plaintiff had to use IRS Form 2553 and follow the accompanying IRS instructions for that form. Central to the instant dispute is the interpretation of the following section in that set of instructions:

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[1] Plaintiff has a return receipt indicating defendant received the completed Form 2553 the next day.

> E. Acceptance or Non-acceptance of Election. — IRS will notify you if your election is accepted and when it will take effect. *You should generally receive determination on your election within 60 days after you have filed Form 2553.* Do not file Form 1120S until you are notified that your election is accepted * * *.
>
> You will also be notified if your election is not accepted.
>
> Care should be exercised to ensure the election is received by Internal Revenue Service. If you are not notified of acceptance or non-acceptance of your election within 3 months of date of filing (date mailed), you should take follow-up action by corresponding with the service center where the election was filed. [emphasis added]

According to plaintiff, this language created a contract wherein the IRS promised to notify plaintiff of its acceptance or nonacceptance of the election within 60 days. Accordingly, if a contract had been created, since plaintiff's election was filed on October 15, 1986, then the IRS would have been contractually bound to notify plaintiff on or about December 14, 1986. Such notification did not take place within that time period, and the election was eventually rejected more than one year later. Thus, if the system had worked as plaintiff had envisioned, plaintiff would have known by mid-December, 1986, whether or not it was an "S" or a "C" corporation. Since it already knew "C" corporations had to utilize the accrual method, once it knew it could not achieve "S" corporation status with a July 31 fiscal year,

it would have known it had until April 26, 1987, to request a change of its method of accounting.

Unfortunately, the system failed to function as smoothly as plaintiff anticipated. Since plaintiff had received no response by mid-1987, it wrote to defendant on June 10, 1987, inquiring as to the IRS's acceptance or nonacceptance of the plaintiff's "S" corporation election. On December 15, 1987, the IRS rejected the October 15, 1986, request for election of "S" corporation status with a July 31 fiscal year.[2] The IRS did indicate plaintiff could adopt or change to a calendar year if it closed its books as of the calendar year (December 31) and computed its income and kept its books and records accordingly. On January 14, 1988, plaintiff responded to the IRS's rejection letter, indicating it was withdrawing its request for "S" corporation status since the IRS's delay in responding created too great an administrative burden to accommodate a calendar year end at that late date. Plaintiff indicated its intent to retain "C" corporation status in order to retain its July 31 year end and requested written confirmation of this (January 14, 1988) correspondence.

Once again the IRS failed to respond promptly. On April 22, 1988, plaintiff again wrote to the IRS requesting both a response to the January 14 letter as well as confirmation of its status. On April 26, 1988, the IRS acknowledged the withdrawal of plaintiff's election and that plaintiff would continue to operate as a "C" corporation with a taxable year ending July 31.

On August 2, 1988, plaintiff completed Form 3115 to request a change in accounting method to convert from cash basis to accrual for the fiscal year ending July 31,

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[2] Defendant's rejection letter did not refer to plaintiff's June 10, 1987 inquiry, but plaintiff submitted a receipt demonstrating its certified letter had been received by defendant.

1987. On September 2, 1988, this application was denied by the IRS as not being timely filed since the deadline was April 26, 1987. On September 22, 1988, plaintiff requested a "good cause" exception to the filing deadline, alleging the lack of timeliness was due to defendant's delay.[3] This request was denied on February 28, 1989. Thereafter, the plaintiff corporation paid certain federal taxes for its 1987 fiscal year, apparently as if the accounting changes had been allowed, and the IRS assessed certain tax deficiencies. Plaintiff did not, however, file a claim for refund of taxes, penalties, or interest in connection with this set of circumstances.

The plaintiff did, however, file a complaint in this Court based entirely on contract principles. Plaintiff's complaint, based on a theory of implied-in-fact contract, invokes this Court's contract jurisdiction under 28 U.S.C. § 1491 (1988). In its complaint, plaintiff alleges that its application on IRS Form 2553 for a change to "S" corporation status was the acceptance of the Government's offer or promise (contained in the Form 2553 instructions) to notify the taxpayer within 60 days whether or not the elected status was achieved. Since the Government failed to notify the plaintiff of its corporate status for over one year, this was a breach of its contractual obligations. This breach in turn prevented the plaintiff from timely filing for a change in accounting method, which in turn led to money damages resulting from the plaintiff's inability to spread corporate income over a period of several years. Thus, the complaint requests money damages to right this contractual wrong. The complaint also seeks declaratory relief in that it requests this Court to order the IRS to permit the plaintiff to change accounting methods and spread

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[3] The Commissioner's discretion with respect to extending the filing deadline is provided for in Treas. Reg. § 1.9100-1(a) (1988).

certain taxable income over several years, alleging that the IRS's refusal to do so was an abuse of discretion.

Pursuant to USCC Rule 12(b)(1), defendant has now moved to dismiss this action based on lack of subject matter jurisdiction.

Discussion

In its motion to dismiss, the Government takes the position that the plaintiff does not have a contract claim cognizable in this Court. The Government admits the plaintiff might have a tax refund claim, assuming certain jurisdictional hurdles have been complied with, but it asserts that this Court does not have subject matter jurisdiction over the plaintiff's "contract" claim. The Government argues that since the plaintiff does not have a contract, there can be no "breach" and thus no money damages. Furthermore, since there is no contract and thus no monetary damages, there can be no declaratory orders issued by this Court to the IRS. The Government points out that this Court has no general authority to issue declaratory judgments.

A. Implied-in-Fact Contract

In this case, the defendant disputes that the IRS has made a promise to make a determination within any given time period, not to mention 60 days. As a result, there has been no mutual assent and there can be no implied-in-fact contract. *See Somali Dev. Bank v. United States*, 205 Ct. Cl. 741, 751, 508 F.2d 817, 822 (1974). Defendant submits that the word "generally" in the phrase "[y]ou should generally receive determination on your election within 60 days * * *" renders the phrase too nonspecific to be the basis for mutual assent or a

meeting of the minds. Furthermore, the subsequent statement directing the taxpayer to make renewed contact with the IRS if there has been no response within 90 days: "[i]f you are not notified of acceptance or non-acceptance of your election within 3 months of date of filing (date mailed), you should take follow-up action by corresponding with the service center where the election was filed" supports defendant's contention that no promise, especially with respect to any time period, was ever intended.

Defendant also urges that there is no need for further factual development of whether or not there was a "meeting of the minds" since Form 2553 is before the Court and clearly establishes the statement plaintiff relied upon is not a promise. Thus, it is appropriate to dismiss this case on jurisdictional grounds.

For its part, the plaintiff contends that courts have liberally interpreted implied-in-fact contracts for jurisdictional purposes. Plaintiff cites *Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988) for the following propositions: a) an implied-in-fact contract can be based on statements made in an IRS publication, and, b) in ruling upon a motion to dismiss for failure to state a claim, the court must assume the facts alleged (*i.e.*, a "meeting of the minds") are true.

Suits alleging implied-in-fact contracts are generally fact intensive, and determining when and whether there was the necessary meeting of the minds frequently requires resolution of a factual dispute. However, this case presents an exception to that general rule since this dispute would not benefit from further factual ventilation. There is no factual dispute — Form 2553 and the instructions pertaining thereto are before the Court and it is clear that the statement upon which plaintiff relies is not a definite promise and thus, as a matter of law, there is no mutual assent.

This is further buttressed by the caveat in the instructions in Form 2553: "If you are not notified of acceptance or non-acceptance of your election within 3 months of date of filing (date mailed), you should take follow-up action by corresponding with the service center where the election was filed." This caveat clearly indicates not only that the Government does not promise to respond within 60 days, but that a condition precedent to any further Government response is notification by the plaintiff after three months have elapsed. Plaintiff responded approximately eight months later. Thus, even the plaintiff did not treat the instructions as embodying a contract.

A recent decision of the United States Court of Appeals for the Federal Circuit has set forth the standard of review of a USCC Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *W.R. Cooper Gen. Contractor, Inc. v. United States*, 843 F.2d 1362 (Fed. Cir. 1988). The court, citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974), emphasized that if the facts revealed any possible basis upon which the plaintiff might prevail, the motion must be denied. *W.R. Cooper*, 843 F.2d at 1364. In *W.R. Cooper*, the Department of Labor (DOL) requested funds be withheld from the plaintiff subcontractor by the city for alleged violation of federal wage statutes. Subsequently, the DOL obtained those funds. The court held it was possible, once the facts had been further developed, that a contract existed obligating the DOL not to take the withheld funds until after it had resolved the dispute with the subcontractor over the alleged violations. *Id.*

In this case there is no possible basis upon which the plaintiff might prevail. Form 2553 is before the Court and its language is quite clear. Not only is there is [*sic*] no promise to respond within 60 days, but the plaintiff is expressly notified that it must take "follow-up action" if

there is no response within three months. There are no more facts to develop. There are no allegations in the complaint or other papers that any IRS official was personally involved or agreed or assented to anything. Thus, the essential element to any contract that there be a meeting of the minds has not occurred.

Additionally, the basis for contractual liability in *Merrick* was not the statements made in the IRS publication, but that the parties had subsequently negotiated and the Acting District Director for the IRS involved indicated the award amount had been fixed. *Merrick* at 726. Again, in this case, there has been no negotiation between IRS personnel and the plaintiff and no one from the IRS has assented to anything.

Similarly, although plaintiff has asserted the facts alleged in the instant complaint are analogous to those in *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir. 1975), in which an implied contract was recognized, that case is readily distinguishable from the case at bar. It is true, as plaintiff has asserted, that the *Armstrong* court held that an invitation to bid on a contract followed by a submission of a bid created an implied contract that required the Government to act fairly. However, even if that case were binding precedent, which it is not, the unfair act by the Government was that it violated its own regulations by adjusting the bid of another bidder, thereby displacing the low bidder, who brought suit. *Armstrong* at 403. Unlike *Armstrong*, not only was there no act by the Government here, which buttresses the fact that there was no mutual assent, but the Government has not violated its own regulations. In short, there is no unfair act by the Government, and that was the basis of the decision in *Armstrong*.

Actually, the facts in *Cutler-Hammer, Inc. v. United States*, 194 Ct. Cl. 788, 441 F.2d 1179 (1971) are more analogous to the case at bar. The plaintiffs in that case

urged that a Treasury Department regulation providing for the submission of applications to buy certain quantities of silver at a price which will be not less than $1.29+ was an "offer" which the plaintiffs accepted by filing the forms. The Court of Claims, however, held the regulation was not an offer and indicated "[i]n general, the obligation of the Government, if it is to be held liable, must be stated in the form of an undertaking, not as a mere prediction of statement of opinion or intention." 194 Ct. Cl. at 794, 441 F.2d at 1182.

The court noted there was no promise by the Government to sell any silver at the price mentioned, and concluded "[i]t requires a distortion of plain English to infer that making an application in conformity with the terms of this Regulation would constitute an acceptance of an offer whereby the United States intended to bind itself." 194 Ct. Cl. at 795, 441 F.2d at 1183. *See also, Tree Farm Dev. Corp. v. United States*, 218 Ct. Cl. 308, 320, 585 F.2d 493, 500 (1978), involving a Government invitation to file for a federal loan guarantee: "We quote from *Cutler-Hammer* to show that invitations by the Government to file applications do not necessarily equal an operative offer, the acceptance of which will result in a binding contract."

Additionally, it should be noted that the instructions accompanying Form 2553 made clear that the acceptance of subchapter "S" corporation status election was not automatic, and thus, the election was subject to Government approval. Therefore, a contract did not come into existence since

> [p]roviding that the application be subject to such approval is alone sufficient to negate existence of a contract until the approval is granted. * * * Even if the language could otherwise be given such a meaning [as

> an operative offer], the requisite approval "was a condition precedent to the formation of any binding contracts." *D.C. Andrews & Co. v. United States*, 154 Ct. Cl. 460, 465, 292 F.2d 280, 283 (1961).

Cutler-Hammer, 194 Ct. Cl. at 794-95, 441 F.2d at 1182. *Cf. Gray v. United States*, 14 Cl. Ct. 390, 392-93 (1988), *aff'd* 886 F.2d 1305 (Fed. Cir. 1989) (when statute sets forth the offer in absolute terms so there is no discretion to accept or reject the application, it has all the attributes of a contractual offer). Furthermore, in view of *Cutler-Hammer*, an invitation from the Government to submit an application to buy is not, alone, an offer to contract, by analogy, an invitation from the Government to elect corporation status similarly fails as an offer to contract. Additionally, the "you should generally receive determination on your election within 60 days. * * *" language is an example of "mere prediction or statement of opinion or intention * * *" indicated by the *Cutler-Hammer* court as insufficient to be an offer to contract. 194 Ct. Cl. at 794, 441 F.2d at 1182.

In a similar vein, in *Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551, 556 (1987) *aff'd without opinion*, 846 F.2d 77 (Fed. Cir. 1988) *cert. denied*, 488 U.S. 823 (1988), the Court found that a statue [*sic*] and regulations governing procedures for filing mining claims were not offers. The court noted that even if, in the broadest sense, the statute was an "offer" it was

> certainly not an offer to *contract*. It is more accurately characterized as a unilateral ultimatum on the part of the Government. It would do violence to traditional contract theory, not to mention the operation of government, to hold that any statute requiring some

> action by a citizen to obtain a benefit or protect or right constituted an open offer to contract.

12 Cl. Ct. at 556 (emphasis in original) (footnote omitted). Basically, all of these cases stand for the same proposition: that mere solicitations, invitations or instructions from the Government are not offers to contract that bind the Government upon plaintiff's completion of a form, even when the solicitations, invitations, or instructions are embodied in a statute or regulation. The proposition is even stronger here since mere instructions accompanying a *form* are involved, rather than instructions in a regulation or statute.

Despite plaintiff's characterization of this case as a breach of an "implied contract," defendant submits the essence of plaintiff's case is that it is a tax refund suit, and such suits are subject to special procedural rules with which the plaintiff has failed to comply.[4] Defendant characterizes this as a tax refund suit since plaintiff's damages claim (*i.e.*, for the amount of additional taxes it had to or would have to pay plus compensation for the lost use of the money paid for taxes) is shaped by the tax benefits to which it claims entitlement. Accordingly, this tax-related claim is not a "contract," and therefore is not encompassed by the contract element of the statute setting forth this Court's jurisdiction, 28 U.S.C. § 1491.

Plaintiff's response is that this is a contract dispute and the mere mention of the word "taxes" does not convert this lawsuit into a tax controversy. Plaintiff denies this is a tax refund suit since the claim is limited

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[4] For example, under 26 U.S.C. § 7422(a)(1988), plaintiff must first file an administrative claim for a tax refund, and under USCC Rule 9(h)(6), plaintiff must plead specific information with respect to the tax recovery sought.

to a dispute over plaintiff's entitlement to the benefit of its bargain under the Form 2553 submission, rather than a dispute over the amount of tax.

Plaintiff cites *Parrish v. Loeb*, 558 F. Supp. 921 (C.D. Ill. 1982) to support its argument that the mention of the word "taxes" will not convert a lawsuit into a tax refund suit. While plaintiff may be correct in asserting that the mere mention of the word "taxes" will not convert a lawsuit into a tax controversy, the converse is also true. Thus, merely mentioning the word "contract" does not convert a tax controversy into an action based on contract and thus bring it within the jurisdiction of this Court. This lawsuit is basically a tax refund suit. As the predecessor to this Court has held in *West Pub. Co. v. United States*, 198 Ct. Cl. 668, 673 (1972), a claim that is at bottom a tax refund suit is not based on contract.[5]

Basically, plaintiff's damages claim is shaped by the tax benefits to which it claims entitlement. The claim is for the amount of money plaintiff had to or would have to pay as a result of the IRS's failure to consent to a change in accounting method. This type of claim has been treated as a tax refund suit. *See, Diebold, Inc. v. United States*, 891 F.2d 1579 (Fed. Cir. 1989), *cert. denied*, __ U.S. __, 111 S.Ct. 73 (1990)

There simply is no implied-in-fact contract here on which to base jurisdiction in this Court.

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[5] There is an exception to this general rule - this Court has implied-in-fact contract jurisdiction in situations wherein a nontaxpayer (third party) seeks return of levied property used to pay the taxes of another. *Document Management Group, Inc. v. United States*, 11 Cl. Ct. 463, 467 (1987) (citing *Gordon v. United States*, 227 Ct. Cl. 328 (1981) and *Kirkendall v. United States*, 90 Ct. Cl. 606 (1940)). *See also West Pub. Co.* at 677. However, there is no third party involvement here.

B. Declaratory Relief

In regard to the plaintiff's request for declaratory relief, the defendant concedes this Court has the power to grant declaratory relief under Section 1491(a)(3), but stresses this power is quite limited as it is only applicable to procurement bid protest disputes. Accordingly, since this case does not involve a procurement bid dispute, declaratory relief is unavailable.

Similarly, 28 U.S.C. § 1507 (1988), granting this Court limited authority to grant declaratory judgment with respect to the tax code, is by its express language inapplicable here. Section 1507 is confined to declaratory judgments sought under section 7428 of the Internal Revenue Code of 1986, relating to charitable organizations, and the provisions of section 7428 (pertaining to status and classifications of organizations under section 501(c)(3)) are not applicable to this dispute.

While it is possible for this Court to grant equitable relief when the equitable relief is secondary or subordinate to a primary claim for monetary damages, defendant contends, for the reasons set forth *supra*, this Court has no jurisdiction over the claim for monetary relief. Since there is no primary claim for monetary damages over which this Court has jurisdiction, the Court has no incidental jurisdiction over the equitable claims.

The defendant notes that the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1988), creates a declaratory judgment remedy in federal district courts with respect to federal taxes, but this relief, like that of 28 U.S.C. § 1507, is limited to actions brought under section 7428 of the Internal Revenue Code of 1986. As defendant has noted *supra*, the provisions of section 7428 are inapplicable here.

Defendant alleges that despite plaintiff's contention that it is not requesting declaratory relief as to the amount of federal tax due, a declaration that the income could be spread over a number of years has an impact on the amount of tax due in each affected period. Furthermore, the broad language of "with respect to Federal taxes" within the meaning of the Declaratory Judgment Act does not limit the Act's application to only that relief having no effect on the amount due.

With respect to declaratory relief, plaintiff argues that since the complaint states a cause of action for monetary damages based upon an implied contract, rather than a tax refund suit, the Court has jurisdiction over the primary monetary claim and the associated, subordinate request for declaratory relief. The plaintiff argues further that since the instant case is a contract dispute and does not involve a controversy with respect to federal taxes, the Declaratory Judgment Act, 28 U.S.C. § 2201, does not bar this lawsuit.

Plaintiff's arguments with respect to the availability of a declaratory judgment must fail. As summarized *supra*, since there is no contract, the Court lacks jurisdiction over the primary claim for money damages so there is no jurisdiction over the subordinate claim for declaratory relief.[6] Additionally, this Court cannot issue declaratory judgments unless specifically authorized by statute to do so. *See United States v. King*, 395 U.S. 1 (1969). Declaratory relief is generally unavailable when the underlying controversy involves federal taxes. As the Supreme Court held in *Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 (1974), the Declaratory Judgment Act, 28 U.S.C. § 2201, has been said to reflect "congressional antipathy for premature

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[6] Plaintiff admits that the requested declaratory relief cannot stand alone.

interference with the assessment or collection of any federal tax * * *."

The instant cause of action is at bottom a tax refund claim, not a contract claim. Therefore, not only does this Court lack specific statutory authorization to issue a declaratory judgment here, but such an act is specifically excluded by the clear language of 28 U.S.C. §§ 1507 and 2201 that prohibit declaratory relief when the controversy involves federal taxes. There has been no assent by the IRS and thus plaintiff is not entitled to rely upon his own view of the election. Furthermore, judicial redress is or was available in the form of a tax refund suit. Under the facts as alleged here, there is no basis for declaratory judgment relief.

C. Amendment to the Complaint

The final question for this Court, after determining both that there was no contract and that declaratory judgment is unavailable for this type of claim, is whether to allow plaintiff to amend the complaint from an action based on contract to an action based on a tax refund. The answer is no.

The burden is on the plaintiff to plead and prove subject matter jurisdiction once it has been appropriately challenged. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Since this is a tax refund suit, plaintiff has failed to meet the procedural requirements (*e.g.*, USCC Rule 9(h)(6)). Any attempt to amend the complaint would be futile,[7] since, as plaintiff acknowledges, neither has the entire tax amount been

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[7] Furthermore, plaintiff originally relied upon contract jurisdiction, and, pursuant to USCC Rule 8(a)(1), may not now assert tax refund jurisdiction. *Document Management Group, Inc. v. United States*, 11 Cl. Ct. 463, 465-66 (1987).

paid nor has a claim been filed before filing suit. These are jurisdictional requirements. *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on reh'g*, 362 U.S. 145 (1960) (taxes must be fully paid before a suit for their recovery can be commenced); *Wall Industries, Inc. v. United States*, 10 Cl. Ct. 82 (1986) (under 26 U.S.C. § 7422(a), an administrative claim for refund is a jurisdictional prerequisite for maintenance of a suit). Since there is no duly filed administrative claim at this point, this Court, even if the complaint were to be amended, would still be without jurisdiction. In addition, since plaintiff has stated during the oral hearing that it believes the statute of limitations is still open, there can be no irreparable harm if the complaint is dismissed.

CONCLUSION

For the reasons discussed herein, the defendant's motion to dismiss for lack of jurisdiction is granted, and the plaintiff's complaint will be dismissed.

Each party is to bear its own costs.

APPENDIX C

UNITED STATES CONSTITUTION
Amendment V

Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 USC § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

CLAIMS COURT RULES

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on Pleadings

. . . .

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (4) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56. Summary Judgment

. . . .

(c) **Motion and Proceedings Thereon.** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.